

Catholic University Law Review

Volume 32
Issue 3 *Spring 1983*

Article 7

1983

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Recommended Citation

Allen S. Hammond IV, *Now You See It, Now You Don't: Minority Ownership in an "Unregulated" Video Marketplace*, 32 Cath. U. L. Rev. 633 (1983).

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NOW YOU SEE IT, NOW YOU DON'T: MINORITY OWNERSHIP IN AN "UNREGULATED" VIDEO MARKETPLACE

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Recent technological innovations and liberalized Federal Communications Commission (FCC or Commission) entry policies have stimulated an explosion in the number and type of video program distribution facilities. FCC decisions authorizing multipoint distribution service (MDS),¹ low

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1. Multipoint Distribution Service (MDS) is a common carrier service using omnidirectional microwave signals in the super high frequency broadcast band to deliver video, data, text and other information to single and multiple dwelling units and businesses.

As the licensee of a common carrier service, the MDS entrepreneur must offer his or her service for hire on a first-come, first-served nondiscriminatory basis. MDS operators have traditionally leased a significant portion of their program time to subscription services that receive their programming from pay program suppliers. Subscribers of MDS must purchase a special antenna and a down converter that changes the MDS signal to a standard VHF television frequency and sends the signal down a cable to the subscriber's television set. *See generally 1983 Field Guide to the Electronic Media*, CHANNELS OF COMMUNICATION, Nov.-Dec. 1982, at 34 [hereinafter cited as *Channels Field Guide*]; NATIONAL ASSOCIATION OF BROADCASTERS, NEW TECHNOLOGIES AFFECTING RADIO AND TELEVISION BROADCASTING 6-8 (1981) [hereinafter cited as *NEW TECHNOLOGIES*].

The Commission regulates MDS pursuant to title II of the Communications Act of 1934, 47 U.S.C. § 201 (1976 & Supp. V. 1981). The rules governing MDS operations may be found in Multipoint Distribution Service, 45 F.C.C.2d 616 (1974). The Commission recently adopted three notices of proposed rulemaking regarding increased MDS channel allocations, comments filed in Notice of Proposed Rulemaking (Gen. Docket 80-112), 45 Fed. Reg. 29,323 (1980); new MDS technical standards to minimize harmful interference between MDS stations, comments filed in Notice of Proposed Rulemaking (Gen. Docket 80-113), 45 Fed. Reg. 29,350 (1980); and the most "efficient" method of assigning MDS frequencies, comments filed in Notice of Proposed Rulemaking (C.C. Docket 80-116), 45 Fed. Reg. 29,335 (1980). The Commission has not yet published final rules and procedures for MDS. For further discussion of the regulatory policy aspects of MDS, see Botein, *Jurisdictional and Antitrust Considerations in the Regulation of the New Communications Technologies*, 25 N.Y.L. SCH. L. REV. 863, 872-73 (1980); Comment, *The Development of Video Technology*, 25 N.Y.L. SCH. L. REV. 789, 801-06 (1980); MAJORITY STAFF OF THE HOUSE SUBCOMM. ON TELECOMMUNICATIONS, CONSUMER PROTECTION AND FINANCE OF THE COMM. ON ENERGY AND COMMERCE, 97TH CONG. 2D SESS., TELECOMMUNICATIONS IN TRANSITION: THE

power television (LPTV),² and direct broadcast satellite distribution (DBS)³ combined with the removal of programming restrictions on cable television (cable)⁴ and subscription television (STV)⁵ services have has-

STATUS OF COMPETITION IN THE TELECOMMUNICATIONS INDUSTRY 22, 255, 304 (Comm. Print 1981) [hereinafter cited as HOUSE REPORT].

2. Low power television is a new class of television service comprised of small stations broadcasting subscription or advertiser supported programming over limited distances of from 10 to 15 miles. Aside from subscription services, the LPTV station will not require its potential viewership to purchase new receiving equipment. See generally *Channels Field Guide*, *supra* note 1, at 62; NEW TECHNOLOGIES, *supra* note 1, at 11-13.

Although the Commission issued a freeze on further applications from all but remote rural areas, it has received approximately 12,000 LPTV applications. *Communications Daily*, Mar. 16, 1983, at 2. Congress has authorized the Commission to select LPTV licensees by lottery from among qualified applicants in order to reduce the administrative burden of selecting from between mutually exclusive applicants and increased diversity of ownership. See the Omnibus Budget Reconciliation Act of 1981, 47 U.S.C. § 309(i) (Supp. V. 1981). The Commission has yet to institute a lottery although it has issued a notice of proposed rulemaking requesting public comment on various proposals for instituting a lottery system and apportioning preferences for those groups presently under-represented in the ownership of telecommunications facilities. See comments filed in Notice of Proposed Rulemaking (Gen. Docket 81-768), 46 Fed. Reg. 58,110 (1981). LPTV is regulated by the Commission pursuant to title III of the Communications Act of 1934, 47 U.S.C. §§ 301-399(b). (1976 & Supp. V. 1981). See also Further Notice of Proposed Rulemaking regarding Low Power Television Service, 46 Fed. Reg. 42,478 (1981); Notice of Proposed Rulemaking regarding Low Power Television Service, 45 Fed. Reg. 69,178 (1980); Low Power Television Broadcasting, 68 F.C.C.2d 1525 (1978).

3. Direct Broadcast Satellite systems are composed of high-powered, multichanneled satellites transmitting programming over wide geographic areas to single, multidwelling homes and cable systems. Earth stations transmit signals to a satellite that receives, amplifies and retransmits the signals to receivers. The DBS technology could potentially provide from 30 to 60 new channels of video programming to local, regional and national markets. The actual number of channels is dependent upon the number of satellite orbital positions and the amount of spectrum allotted to the United States at the 1983 Regional Administration Radio Conference. One orbital slot and 500 MHz of spectrum would allow 30 new video channels to exist. Pitsch, *Home Video Competition: What Should Regulators Do?* TVC MAGAZINE, October 1, 1982, at 78, 80; *Channels Field Guide*, *supra* note 1, at 30; NEW TECHNOLOGIES, *supra* note 1, at 17. While the Commission has adopted licensing criteria for DBS, the ultimate exercise of its regulatory authority is unclear. Because DBS will involve "the transmission of radio signals in interstate commerce," it is clearly covered by title III of the Communications Act. However, DBS may also be regulated as a common carrier under title II of the Act, or as a "hybrid service" under titles II & III. Report and Order in the Matter of Direct Broadcast Satellites, F.C.C. 82-285 released July 14, 1982; Notice of Proposed Policy Statement and Rulemaking regarding DBS, 46 Fed. Reg. 30,124 (1981); Notice of Inquiry regarding DBS, 45 Fed. Reg. 72,719 (1980). For a detailed discussion of the jurisdictional and regulatory considerations, see Ferris, *Direct Broadcast Satellites: A Piece of the Video Puzzle*, 33 FED. COM. L.J. 169 (1981); Lyons & Hammer, *Deregulatory Options for a Direct Broadcast System*, 33 FED. COM. L.J. 185 (1981); Botein, *supra* note 1, at 873.

4. Cable television systems are multichanneled distribution facilities that transmit video programming by coaxial (or fiber optic) cable to subscribers. Programming services provided via cable may be advertiser supported or subscription services. Basic cable systems are comprised of towers with antennas or satellite dishes to receive broadcast television or

tened the creation of what most observers term the new video marketplace. These services are being joined by satellite master antenna television services (SMATV),⁶ a hybrid of satellite and cable technology.

Like cable in the early seventies, this cornucopia of new video outlets provides major opportunities for small and minority firm entry into the expanded marketplace of the eighties. Such opportunities have been slow to develop however. Historically minorities have owned and operated few video distribution outlets and have received little minority-relevant programming.⁷ Currently, less than 1% of the operating video outlets are minority-owned despite the fact that minorities comprise more than 20% of the American population.⁸

satellite signals, a "headend" that processes, amplifies and retransmits the signals, and the wire network through which the transmitted signals reach the subscribers. See Pitsch, *supra* note 3, at 78; *Channels Field Guide*, *supra* note 1, at 8-9; NEW TECHNOLOGIES, *supra* note 1, at 1; Comment, *supra* note 1, at 793-96. The Commission currently engages in "limited" regulation of cable, having lifted many earlier restrictions. See 47 C.F.R. §§ 73.1-73.617 (1982); HOUSE REPORT, *supra* note 1, at 250.

5. Subscription television stations broadcast scrambled signals to subscribers who pay a fee for or lease special decoders which unscramble the signal. STV provides the majority of its services to single family dwellings in communities where cable service has been slow to get started. See *Channels Field Guide*, *supra* note 1, at 34; NEW TECHNOLOGIES, *supra* note 1, at 9. STV station operations recently underwent significant deregulation. The Commission removed regulations that: a) restricted the markets in which STV stations could operate; b) required the weekly broadcast of 28 hours of conventional television programming by STV stations; c) prohibited the sale of signal decoders; and d) required applicants for STV authorization to ascertain the needs and interests of their community of license for subscription television. Subscription TV Service, 90 F.C.C.2d 341 (1982); Subscription Television Service, 88 F.C.C.2d 213 (1981); Subscription TV Program Rules, 52 F.C.C.2d 1 (1975).

6. Satellite Master Antenna Television Services are a hybrid of satellite and cable technologies. They are essentially private cable systems that receive their programming via the use of a satellite receiving antenna and distribute the signals to subscribers via cable. SMATV usually serves large multidwelling units such as apartment and condominium complexes in markets where cable has been slow to start. It is essentially unregulated by the Commission. SMATV systems are currently battling with pay programming services delivered by satellite because many SMATV systems receive and distribute the programming without permission and without paying any fee. In other instances, SMATV operations have been refused programming by some pay cable networks. They have also encountered political and legal opposition from certain municipalities seeking to protect cable revenue bases from which cities derive franchise fees. Pitsch, *supra* note 3, at 83; *Channels Field Guide*, *supra* note 1, at 35; Gits, *Getting Even*, CABLEVISION, Sept. 20, 1982, at 14; *Small Earth Stations Blossom into Big Business*, BROADCASTING, Dec. 22, 1980, at 31.

7. For the purpose of this article, minorities are defined as persons who are Afro-American, Hispanic surnamed, American Eskimo, Aleut, American Indian or of Asiatic-American extraction. Minority-owned and managed outlets are those in which in excess of 50% of the shares or control is vested in minorities. Minority Ownership of Broadcasting Facilities, 68 F.C.C.2d 979, 980 n.8, 983 n.20 (1978).

8. Hammond & Guernica, *Minority Business Involvement in the Telecommunications Industry*, U.S. Dep't of Commerce Contract No. BE-82-SAC-10237, at 1 (1982).

The lack of minority participation in ownership is extremely serious for several reasons. First, minority ownership of video production and/or distribution firms can have a profound positive impact upon the diversity of information which the American society receives about itself and the world. Second, the current technologically motivated innovation and growth within the video industry could spawn small firms that create a disproportionately greater number of employment opportunities and more innovative services than their larger established counterparts.⁹ Third, increased minority ownership would facilitate the expansion of an economic base within the minority community and allow minorities to make a more enduring contribution to the general welfare as employers and as producers of goods, services, and innovation.¹⁰

Rapid technological growth in video distribution facilities has stimulated two major developments: 1) federal reassessment of the Commission's ownership restrictions,¹¹ and 2) accelerated merger and acquisition

9. MINORITY BUSINESS DEVELOPMENT AGENCY, MINORITY BUSINESS ENTERPRISE TODAY: PROBLEMS AND THEIR CAUSES 1 (1982); NATIONAL SCIENCE BOARD, SCIENCE INDICATORS, 1976 (Mar. 1979).

10. The value of minority entrepreneurship has been recognized by the Reagan Administration. See The White House Office of the Press Secretary, Statement of the President, Dec. 17, 1982; Denton, *Reagan Proclaims Concern for Blacks*, Wash. Post, Sept. 16, 1982, at A1, col. 3.

11. See *infra* text accompanying notes 138-48. The Commission's multiple ownership rules (rule of sevens) prohibit any one entity from owning more than seven television stations (of which no more than five may be VHF), seven AM radio stations and seven FM radio stations. See 47 C.F.R. §§ 73.35(b), 73.240(a), 73.636 (1981). The rules are the embodiment of the Commission's view that: "the operation of broadcast stations by a large group of diversified licensees will better serve the public interest than the operation of broadcast stations by a small and limited group of licensees." Amendment of the Multiple Ownership Rules, 18 Fed. Reg. 7796-97 (1953); Multiple Ownership of Television Broadcast Stations, 19 Fed. Reg. 6099 (1954). The rules and the Commission's authority to make them were upheld in *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956). Fundamentally, the rules seek to "promote diversification of ownership in order to maximize diversification of program and service viewpoints as well as to prevent any undue concentration of economic power contrary to the public interest." Amendment of Multiple Ownership Rules, 18 Fed. Reg. at 7796.

Recently, the rules have again come under attack as being outmoded and inefficient. The alleged theoretical basis for the negative assessment may be found in a 1980 report to the Commission on the feasibility of the development of new television networks. NETWORK INQUIRY SPECIAL STAFF, FEDERAL COMMUNICATIONS COMMISSION, 1 FINAL REPORT, NEW TELEVISION NETWORKS: ENTRY, JURISDICTION, OWNERSHIP AND REGULATION 316, 325, 360 (1980). More recently, Congress has sought to modify the impact of the rules in comparative hearings. See H.R. 2382, 98th Cong., 1st Sess., 129 CONG. REC. H1809 (daily ed. Mar. 24, 1983); S.55, 98th Cong., 1st Sess., 129 CONG. REC. S1155 (daily ed. Feb. 15, 1983); H.R. 1298, 97th Cong., 1st Sess., 127 CONG. REC. H213 (daily ed. Jan. 27, 1981); H.R. 3475, 97th Cong., 1st Sess., 127 CONG. REC. H1932 (daily ed. May 6, 1981); H.R. 4781, 97th Cong., 1st Sess., 127 CONG. REC. H7494 (daily ed. Oct. 20, 1981). Substantial support for the modifica-

activity by large established video distribution firms.¹² The impetus for

tion or elimination of the rule of sevens is likely to continue in both the House and Senate. See *Policy: Marketplace Has Become the Watchword*, BROADCASTING, Jan. 3, 1983, at 62; *Broadcast, Cable Deregulation Occupy Hill*, BROADCASTING, Feb. 21, 1983, at 31; *One On One in Washington*, BROADCASTING, Mar. 7, 1983, at 38; *Wirth's View on the State of the Industry*, BROADCASTING, Feb. 7, 1983, at 71. The National Telecommunications and Information Administration (NTIA) has supported congressional efforts in this regard. See *Broadcast Regulation Reform Proposals; Hearing on H.R. 4726, H.R. 4780, & H.R. 4781 before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 97th Cong., 1st Sess. (1981) (statement of Bernard J. Wunder, Jr., former Assistant Secretary for Communications and Information, U.S. Dept. of Commerce). Significant calls for repeal have also emanated from members of the Commission. See *FCC in 1983: Undaunted Deregulatory March*, BROADCASTING, Jan. 17, 1983, at 78; Fowler & Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207 (1982).

The Commission has also issued notice of its intent to revise the current attribution rules with which it determines the extent of a multiple owner's "cognizable interest" in broadcast, cable and newspaper properties. Under the current rules, widely held corporations (51 or more shareholders) are determined to be owners if they own 1% of the voting stock; with closely held corporations (50 or fewer shareholders), any voting partnership or proprietorship interest is significant. Passive investors (banks, investment and insurance companies) may own up to 5% of voting stock before they are considered owners. 47 C.F.R. § 73.636 nn.1-11 (1982).

The proposed changes would allow all utilities to own from 5% to 20% of common stock before being considered owners for the purposes of the rules. See Notice of Proposed Rulemaking in the Matter of Revision of the Multiple Ownership Attribution Rules, FCC 83-46, Jan. 28, 1983; *FCC Wants to Redefine "Owner"*, BROADCASTING, Jan. 31, 1983, at 34.

The Commission's network/cable cross-ownership policy currently prohibits the ownership of cable television systems by the major television networks. 47 C.F.R. § 76.501 (1982). The policy is presently under review as a result of the conclusions of the FCC Office of Plans and Policy Staff Report on Cable Ownership. The Report concluded inter-alia that the market for cable services was workably competitive (i.e., subject to the bona fide threat of competitive entry from other media) and, therefore, prohibition of network ownership of cable was unnecessary. OFFICE OF PLANS AND POLICY, FEDERAL COMMUNICATIONS COMMISSION, FCC POLICY ON CABLE OWNERSHIP (1981). On November 5, 1981, the Commission released the Report for Comment, F.C.C. News Release No. 432 (Nov. 5, 1981), and, on July 15, 1982, issued a Notice of Proposed Rulemaking in Docket No. 82-434, proposing to permit the major television networks to buy cable systems. While the Commission has received comments and reply comments in the proceeding, it has not yet issued final rules. See also *Dawson's Herfindahl Proposal*, BROADCASTING, Aug. 2, 1982, at 44; *An Index in the Act On Multiple Ownership*, BROADCASTING, Jul. 19, 1982, at 35; *"Let Us In," "Keep Them Out" Highlight Comments on Broadcast-Cable Cross Ownership*, BROADCASTING, Jan. 25, 1982, at 34.

12. Brown, *ABC's Wide World of Risks*, Wash. Post, Jan. 16, 1983, at F1, col. 1; *Changing Hands 1982*, BROADCASTING, Jan. 10, 1983, at 45, 46, 48; *Cable 1981: A Taste of Reality*, CABLEVISION, Jan. 4, 1982, at 26; *The "Urge to Merge": Cable's Consolidation*, TVC, Oct. 1, 1981, at 86; *New Video's New Bedfellows*, BROADCASTING, Sept. 28, 1981, at 21; Phillips, *Busting the Media Trusts*, HARPER'S, July 1977, at 23. Congress and the Federal Trade Commission have shown increasing concern over the increase in the concentration of media ownership. *Cable Television Industry: Hearings Before the Subcomm. on SBA and SBIC Authority, Minority Enterprise and General Small Business Problems of the House Comm. on Small Business*, 97th Cong., 1st Sess. (1981); *Media Concentration, pts 1 & 2: Hearings Before*

the reassessment of the ownership rules by the Executive Branch, Congress and the Commission is the assumption that the presumed plethora of distribution outlets will dispel the need for federal regulation of media concentration to assure program diversity. According to this reasoning, a large number of competitive outlets will assure that consumer demands for program service are met.

Meanwhile, the large established video distribution firms are merging with or acquiring other distribution facilities to protect or expand their market shares. This phenomenon is understandable in light of the competitive risk that attends the potential entry of new competitors in local and national markets. However, the actions of the established firms when combined with the removal of federal ownership restrictions threaten to destroy the opportunities for market entry and competition.

"Market deregulation," including the removal of ownership restrictions during a time of accelerated merger and expansion activity by large communications firms, will seriously undermine the ability of minority and small firms to enter into the video marketplace. The cost of capital and entry into lucrative markets will be increased substantially due to competition from larger, better financed telecommunications firms which have been previously unresponsive to specialized consumer demand. The conclusion that the increased number of present and potential outlets will force entrepreneurs to provide responsive programming to presently underserved groups is at best uncertain and at worst unwarranted. Advertiser or subscriber based demand for services will continue to reflect current target market preferences (albeit more specialized) because of the distribution of wealth. Moreover, the ultimate cost of the production and distribution of specialized programming is relatively unknown,¹³ as programmers and distributors seeking to serve distinct groups must compete for limited financing with other competitors seeking to serve audiences

the Subcomm. on General Oversight and Minority Enterprise of the House Comm. on Small Business, 96th Cong., 2d Sess. (1980) [hereinafter cited as *Media Concentration*]; *Proceedings of the Symposium on Media Concentration*, vols. I & II, Bureau of Competition, FTC (Dec. 1978). See especially, Dertouzos, *Media Conglomerates: Chains, Groups, and Cross Ownership*, *id.* at 472; Bradley, *Antitrust Policy for Media Concentration*, *id.* at 687.

13. There is more than a 50% mortality rate among narrowcasters. Major program distributors such as CBS have failed in new pay program distribution ventures. Grillo, *Programming: Five Services Launch and CBS Cable Folds in a Year of Success and Disappointment*, CABLEVISION, December 27, 1982, at 34. Meanwhile, audience preferences, as measured by the amount of switching between pay offerings ("churn") remain very difficult to assess. See *Entertainment Channel's End*, BROADCASTING, Feb. 28, 1983, at 44; Baker, *Staying Afloat in a Sea of Churn: Just How Bad is the Storm?*, CABLEVISION, Nov. 22, 1982, at 5; DiSanti, *Who Will Survive?*, MULTICHANNEL PROGRAMMING, July 19, 1982, at 8.

perceived as more desirable. Former FCC Commissioner Margita White warned:

[T]he FCC in structuring entry and establishing licensing procedures for new and developing technologies must continually consider whether its proposed policies will encourage or preclude minority entrants.

For example, the FCC promulgated ownership and other rules to promote diversity of media control, including minority ownership. . . . [T]heir abrupt removal could result in greater market dominance by established entities, less diversity and fewer opportunities for new entrants . . . including minorities.¹⁴

This article examines the efficacy of the Commission's proposed move to eliminate the ownership rules under current market conditions. It assesses the likelihood of significant minority ownership of new and existing video distribution systems in an unregulated "workably competitive" marketplace, based upon economic theory, antitrust law, the first amendment and the history of minority business development in the United States.

I. THE MINORITY EXPERIENCE IN THE VIDEO MARKETPLACE

A. *The Image of Minorities: An Historical Perspective*

By showing us worlds we would otherwise seldom see, by determining the elements of those worlds on which to focus, and by presenting them in a context of good and bad, television helps to shape what we know about our world, what we believe about it and what we feel about it.¹⁵

[I]t is primarily the constant bombardment of our minds with modern day Toms, picanninies, mammies, and dim-witted coons as role models for our children and our minds that inflict the fatal paralysis of self-hatred.¹⁶

Television has historically been criticized for its failure to portray minorities in a fair and balanced manner in its news and entertainment pro-

14. ADVISORY COMMITTEE ON ALTERNATIVE FINANCING FOR MINORITY OPPORTUNITIES IN TELECOMMUNICATIONS, STRATEGIES FOR ADVANCING MINORITY OWNERSHIP OPPORTUNITIES IN TELECOMMUNICATIONS: FINAL REPORT TO THE FEDERAL COMMUNICATIONS COMMISSION, 1 (1982) [hereinafter cited as ADVISORY COMMITTEE REPORT].

15. UNITED STATES COMMISSION ON CIVIL RIGHTS, WINDOW DRESSING ON THE SET: AN UPDATE 45 (1979).

16. Brown, *Black TV Image Month*, TONY BROWN'S J., Oct.-Dec. 1982, at 2. See also Hatcher, *Mass Media and the Black Community*, 5 BLACK SCHOLAR 4 (1973); Johnson, *Telecommunications Technology and the Socialization of Black Americans: Issues, Concerns and Possibilities*, 158 (1974) (Thesis, Wash. Univ., St. Louis, Mo.).

gramming.¹⁷ There are many sources of criticism including journalists, academicians, government agencies, public interest and civil rights organizations. In the 1950's, television was said to have the potential to produce a prejudice-free era in popular entertainment. Unfortunately, then, as now, "shows stressing authentic images [of blacks] failed to establish lasting success."¹⁸

"Amos 'n' Andy," the first long running network program in which blacks (or any minority) starred, was a stereotyped depiction of black life. The characters were so offensive to many blacks that the National Association for the Advancement of Colored People (NAACP) demanded that the program be removed from the air.¹⁹ American Indians were frequently depicted in an unsympathetic manner in westerns. Asian Americans were primarily seen in stereotyped roles in the "Charlie Chan" or "Fu Manchu" roles, or as "the enemy" in World War II films. Hispanic Americans were seen in western movies as stereotyped Mexicans.

The civil rights movement of the 1960's created an environment in which television series featuring positive black roles could exist. Yet, in 1968, the limited appearance of Afro-Americans in nonstereotyped roles did not deter the National Advisory Commission on Civil Disorders (the Kerner Commission) from concluding that television's failure to "portray the Negro as a matter of routine and in the context of the total society . . . [had] contributed to the black-white schism in this country."²⁰ Meanwhile, other minorities remained virtually absent from television drama of the period.

During the seventies, minorities were regularly featured in situation comedies (sitcoms) and "police shows," but rarely in serious dramas addressing serious issues. In 1977, the United States Commission on Civil

17. See generally Polier, *Black TV Journalists: Jibing a Cool Image with Sitcoms' Stereotypes*, NATIONAL LEADER, Oct. 28, 1982, at 8, col. 1; UNITED STATES COMM'N ON CIVIL RIGHTS, *supra* note 15; HOWARD R. MARSH CENTER, UNIVERSITY OF MICHIGAN, KERNER PLUS 10: MINORITIES AND THE MEDIA (1977); Roberts, *The Presentation of Blacks in Television Network Newscasts*, 52 JOURNALISM Q. 50 (1975); Hinton, Seggar, Northcott, & Fontes, *Tokenism and Improving Imagery of Blacks in TV Drama and Comedy: 1973*, 18 J. BROADCASTING 423 (1974); Kassarian, *Blacks as Communicators and Interpreters of Mass Communication*, 50 JOURNALISM Q. 285 (1973); Pride & Clarke, *Race Relations in Television News: A Content Analysis of the Networks*, 50 JOURNALISM Q. 285 (1973); Seggar & Wheeler, *World of Work on Television: Ethnic and Sex Representation in TV Drama*, 17 J. BROADCASTING 201 (1973); DeFleur, *Occupational Roles as Portrayed on Television*, 28 PUB. OPINION Q. 57 (1964).

18. *Blacks in White TV*, TONY BROWN'S J., Oct.-Dec. 1982, at 6, 7.

19. United States Comm'n on Civil Rights, *supra* note 15, at 1.

20. Report of the National Advisory Comm. on Civil Disorders (New York: Bantam Books, 1968), at 211.

Rights (USCCR) presented a historical review of the portrayals of minorities and women in prime time programming and news from 1969 through 1974. It concluded that minorities in prime time television drama were disproportionately underrepresented in numbers and prestigious occupations.²¹ In 1978, the FCC was "compelled to observe that the views of racial minorities continue to be inadequately represented in the broadcast media."²² The USCCR published a second report on the television's portrayals of minorities and women in 1979. It found that portrayals had not improved between 1975 and 1977.²³

In 1982, despite the critical and financial success of "Roots I and II," a major television network "may" reduce the weight given a movie proposal "if any of the central characters are other than white Americans."²⁴ Meanwhile, "[a]side from sitcoms and . . . a few soap operas, blacks have nearly vanished from television."²⁵ Consequently, the NAACP and the National Urban League are seeking to increase black participation in broadcasting and the removal of negative television and film stereotypes via boycotts and concerted advocacy.²⁶ The League of United Latin American Citizens also filed a class action discrimination complaint with the Equal Employment Opportunity Commission against the major television networks, production studios and advertising agencies.²⁷ The complaint alleges that the "lack of news coverage of Hispanics and the failure of the networks and production studios to portray [Hispanics] in a positive manner gives Americans a distorted picture of the Hispanic community."²⁸

21. United States Comm'n on Civil Rights, *supra* note 15, at 61.

22. Minority Ownership of Broadcasting Facilities, 68 F.C.C.2d 979 (1978).

23. United States Comm'n on Civil Rights, *supra* note 15, at 60-61.

24. The eight-day telecast of Alex Haley's saga of black America's history boosted ABC's prime-time programming for "Roots" week (Jan. 24-30) to a 35.5 national Nielsen rating, 10 points higher than any network had ever chalked up in one week. The Sunday night conclusion, the most widely viewed program ever, scored a phenomenal 51.1 rating and 71 share, giving it a total of 36,380,000 homes—a figure that beat the previous leader, NBC's 'Gone with the Wind,' part I, by more than three million homes.

Seldom before had television so graphically demonstrated its great power to unite people in a common experience. "Roots," as this magazine wrote, was "drastically different in subject matter, innovative in scheduling, and devastating in its competitive effects. . . . It helped to quiet, at least temporarily, some of the harsher critics of television by demonstrating that mass programming and good programming are not always mutually exclusive."

Special Report: The State of the Fifth Estate, BROADCASTING, Jan. 2, 1978, at 28. See *CBS Drops Movie Evaluation Plan After Leak*, BROADCASTING, Aug. 9, 1982, at 61.

25. Early, *Lou Gosset, Jr.'s Tough 'Gentleman'*, Wash. Post, Aug. 23, 1982, at C1, col. 5.

26. *Is TV Off-Color?*, TONY BROWN's J., Oct.-Dec. 1982, at 13.

27. *Hispanics Claim TV Ad Bias*, The Wash. Times, Oct. 15, 1982, at 3A, col. 1.

28. *Id.*

The League of United Latin American Citizens' complaint echos concerns stated on numerous occasions by other civil rights organizations, federal agencies and commissions, social scientists and the press. Many believe that television's pervasive, stereotypic, largely comedic portrayals of minorities negatively affect minority and majority America. The negative images are said to create feelings of inferiority and self-hatred in minorities while creating unfounded feelings of superiority in whites.²⁹

Social science research has begun to document such feelings. Studies have shown that heavy television viewers (viewers of four or more hours per day) regard television as more true-to-life than it really is,³⁰ and are more likely to perceive minorities as inferior.³¹ Heavy users held this perception regardless of socio-economic strata. It is therefore still reasonable to conclude, as the Kerner Commission did in 1968, that "[i]f what the white American . . . sees on television conditions his expectation of what is ordinary and normal in the larger society, he will neither understand nor accept the Negro American."³²

Negative portrayals of blacks (and other minorities) foster ignorance and racism on the part of white Americans. The impact on blacks and other minorities is no less profound. The only difference is the focus and target of the ignorance and racism. For minorities, the focus and target is themselves. Such a situation is detrimental, not only to the minority audience, but also to all the viewing public and contributes to the minority-majority schism in this country.

B. Minority Access to Videoland: Underrepresented, Undercounted, and "Unregulated"

Access to and control over the video program distribution system is a function of economic and regulatory power which the consumer/citizen can exert. But minorities exert little power over the video distribution system and consequently enjoy little access and less control. There are several reasons for this phenomenon.

First, advertisers and videocasters³³ tend not to view minorities as desir-

29. See *supra* note 16.

30. See Waters, *Life According to TV*, NEWSWEEK, Dec. 6, 1982, at 211.

31. *Id.*

32. Report of the National Advisory Comm. on Civil Disorders, *supra* note 20, at 211.

33. The term "videocasters" refers to those commercial firms which distribute video programming over the air, by wire or by satellite. The term includes broadcast television regardless of power, cable (whether coaxial or fiberoptic assisted), MDS and satellite assisted systems such as DBS and SMATV. The program services provided by the firms may be advertiser and/or subscriber supported. Videocassette and videodisk retail and/or rental firms are not included.

able (i.e., demographically attractive), culturally distinct markets for the consumption of goods and services.³⁴ The business realities of electronic video media require that videocasters seek to attract and hold the segments of the viewing audience controlling the largest portion of disposable income. These audience segments are typically white females and males eighteen to forty-nine years of age.³⁵ While minorities control an increasing share of the nation's wealth and consume a wide array of products,³⁶ the mass audience focus of the electronic media (especially broadcasting) eschews specialized programming for fear of alienating the "main" audience.

The second reason minorities exert limited consumer access control over videocasters is that ratings services provide inaccurate information on minority program consumption patterns. The ratings services' sampling and data retrieval techniques too often give an incomplete picture of minority audience preferences³⁷ and reinforce notions that minorities act in the same manner as their majority audience counterparts. Because the current information regarding minority preferences and consumption patterns is so inadequate, minority owned media receive little economic incentive to distribute more minority oriented and/or responsive programming.³⁸

Finally, constitutional prohibitions against government censorship restrict many of the regulations that seek to alleviate the lack of minority economic power. Regulations that affirmatively require quantities of in-

34. Hammond & Guernica, *supra* note 8, at 28; National Association of Black-Owned Broadcasters, Policy Statement on Legislative, Regulatory and Industry Objectives, Sept. 1982, at 12-15; C.C.G., Inc., *Minority Ownership of Broadcast Facilities*, Vol. III, at 62-71 (Jan. 1979); Federal Communications Comm'n Report on Minority Ownership, 25 (1978); Hammond, *The Rewrite of the Communications Act: Are Minorities Written Out?*, 1 CROSS REFERENCE 453, 458 (1978).

35. Women viewers between the ages of 18 and 49 years of age were the most preferred audience of advertisers during the 1970's. During the 1980's some major television advertisers began targeting women 25-54 years of age, in recognition of the aging of the post-war baby boom as reflected in population growth, buying power shifts and other factors. S. EASTMAN, S. HEAD & L. KLEIN, BROADCAST PROGRAMMING: STRATEGIES FOR WINNING TELEVISION AND RADIO AUDIENCES 135 (1981) [hereinafter cited as S. EASTMAN]. The women and men comprising the second most preferred audience are predominantly white. Waters, *supra* note 30, at 140.

36. Various minority commentators have placed minority black income at more than \$100 billion annually. Eugene Jackson, President of the National Black Network, estimated that the average projected income of black workers in 1980 was \$125.8 billion, and would increase to \$225 billion in 1985. See *The Black Market Becomes a Must Buy*, BROADCASTING, Oct. 6, 1980, at 22. A more conservative estimate from 1978 placed the "Black GNP" at \$70 billion. See D. GIBSON, 70 BILLION IN THE BLACK (1978).

37. See generally, sources cited *supra* note 34.

38. See Hammond & Guernica, *supra* note 8, at 1, 19.

formative programming³⁹ of a balanced, fair,⁴⁰ culturally sensitive⁴¹ and nondefamatory nature⁴² are alleged to run the risk of being unconstitutional because the government might impose its notions of appropriate programming on the licensee.⁴³ Consequently, the effectiveness of the regulations are sometimes compromised in balancing public interest and first amendment considerations.⁴⁴ Thus, the FCC has refused to deny a license when broadcast material was false and defamatory of a minority group. The licensee was merely required to be fair in the future.⁴⁵ The FCC has denied license renewals for failure to provide service to minorities in very few instances. In these cases the failures were glaring and egregious, yet the FCC refused to deny the renewals immediately and in one case, deferred action for several years, forcing a court to take the license away.⁴⁶

39. Although radio stations are exempt from the requirement, the Commission still encourages television licensees to air at least 10% nonentertainment programming out of their total hours of broadcast operations. It also encourages television licensees to comply with each of the promises they make in their renewal applications concerning the weekly percentage of time allotted to commercials, news, public affairs, other nonentertainment programming and public service announcements. The percentages are developed from a composite weekly sample drawn from random days selected throughout the five year license term. Radio Broadcast Services; Revision of Applications for Renewal of License of Commercial and Noncommercial AM, FM and Television Licensees, 46 Fed. Reg. 26,236, at 26,244 (1981); Radio Broadcast Services, 47 C.F.R. § 73 (1982). The Commission, through its ascertainment requirements and its 1960 Programming Statement, has indicated its desire that the television licensee's entire community of license be served. Community Problems—Broadcast Applicants, 27 F.C.C.2d 650 (1971); *En Banc Programming Inquiry*, 44 F.C.C. 2303, 2312-14 (1960).

40. Licensees are required to devote a reasonable amount of programming time to controversial issues of public importance and offer reasonable opportunity for the presentation of controversial issues. *In re Handling of Public Issues Under the Fairness Doctrine*, BC Docket 78-60, adopted April 14, 1982; Fairness Doctrine Inquiry, 74 F.C.C.2d 163 (1979); Fairness Doctrine, 67 F.C.C.2d 730 (1978); Fairness Report, 58 F.C.C.2d 691 (1976); Fairness Report, 48 F.C.C.2d 1 (1974); Study of Fairness Doctrine, 30 F.C.C.2d 26 (1971).

41. One of the major elements of broadcast service identified by the Commission is service to minorities in the licensee's service area. See *En Banc Programming Inquiry Statement*, *supra* note 39, at 2314. The Commission seeks to ensure programming responsive to various groups via its equal employment and ascertainment requirements as well as its minority ownership policy. See *NAACP v. Federal Power Commission*, 425 U.S. 667, 670 n.7 (1976).

42. While defamation of individuals and businesses is usually a state matter, the Commission has addressed the matter as it relates to alleged defamation of ethnic groups. *Anti-Defamation League v. F.C.C.*, 403 F.2d 169 (D.C. Cir. 1968), *cert. denied*, 394 U.S. 930 (1969).

43. Fowler & Brenner, *supra* note 11, at 217-19. See also W. JONES, CASES AND MATERIALS ON ELECTRONIC MASS MEDIA chs. IV, V, VI (1978) and accompanying footnotes.

44. Hammond, *supra* note 34, at 455-56.

45. *Anti-Defamation League*, 403 F.2d at 170-71.

46. *Alabama Education Tel. Comm'n*, 50 F.C.C.2d 461 (1975); *Leflore Broadcasting*

These examples illustrate the difficulties minorities experience when they seek redress through the regulatory process.

In summary, minorities exercise little economic or regulatory control over the video distribution system because they are not the most preferred consumers. Their preferences are not accurately determined. Minorities own few outlets and they receive limited assistance via the regulatory process.

II. THE EVOLVING VIDEO MARKETPLACE

The new video marketplace will be different in kind from one dominated by free television programming universally distributed to the consumer. . . . [T]he video infrastructure is evolving into a shape which more closely parallels the audio industry infrastructure. . . . [M]arkets once characterized by scarcity are increasingly characterized by abundance.⁴⁷

A. *The Entry of Alternative Video Distribution Facilities*

The electronic video distribution system is undergoing substantial change. Over the last eight years,⁴⁸ innovations in video program delivery technologies and federal policies favoring the dissolution of technological barriers to market entry have brought the video marketplace to the brink of an era of abundance. The distribution monopoly enjoyed by broadcasters since the late 1940's is giving way to video delivery systems based on innovative uses of broadcast and common carrier technologies.

1. *The Established Outlets*

As of September 1982, there were approximately 748 commercial television broadcast stations serving 213 markets nationwide.⁴⁹ These markets

Co., 46 F.C.C.2d 980 (1974); Lomar Life Broadcasting Co., 38 F.C.C. 1143 (1965), *rev'd sub nom.* Office of Communication of the United Church of Christ v. FCC, 425 F.2d 543 (D.C. Cir. 1969).

47. NEW TECHNOLOGIES, *supra* note 1, at IX.

48. From approximately 1976, Commission repeal of restrictive cable and STV regulations (sometimes with encouragement by the courts), coupled with the development of low cost satellite interconnection and Commission introduction of MDS, LPTV and DBS services have brought the video marketplace to the brink of an era of abundance. *See generally Telecommunications in Transition*, *supra* note 1, at 244-57; 2001: *What's Ahead?*, BROADCASTING, Oct. 12, 1981, at 249-58, 261-69.

49. The total number of commercial television broadcast stations was determined by review of the Commission's September 1982 announcement regarding broadcast station totals. Broadcast Station Totals for Aug. 1982, F.C.C. News Release No. 6567 (Sept. 30, 1982). The 213 markets are based on the geographic unit of measurement employed by the Arbitron and A.C. Nielsen rating services. Each television market is defined exclusive of

were comprised of 81.5 million households owning at least one television set.⁵⁰ Most commercial broadcast stations were advertiser supported,⁵¹ except for nineteen subscriber supported stations. The nineteen subscription television (STV) stations operated in markets comprised of more than 25 million television households. These outlets had over 864 thousand subscribers,⁵² but accounted for little more than 1% of the total television households nationwide.

Ownership of both advertiser-supported and STV stations is highly concentrated. Of the 748 full power commercial and subscription television services, approximately 495 are owned by 165 entities averaging three stations each. Altogether, these 165 group owners own half of the nation's television stations⁵³ and two-thirds of the commercial stations. The most prominent group owners are the three networks and Metromedia.⁵⁴ These corporations, through their stations, each reach from between 20% to 22% of the television households nationwide.⁵⁵

Cable television systems are currently television's major competitors. There are over 4,600 cable systems nationwide.⁵⁶ Cable serves about 31% of the television households and has approximately twenty-five million basic subscribers.⁵⁷ The top fifty multiple cable system owners (MSO's) reach approximately 72% of the basic cable subscribers. Sixty percent of the basic subscribers are reached by the top twenty-five MSO's, while approximately 40% of the subscribers are reached by the top eight.⁵⁸

Newer technologies provide additional alternatives. Multipoint Distribution Systems (MDS)⁵⁹ are small but significant competitors of both television and cable. Two MDS channels are allocated to each of the top fifty markets and one channel each to the remaining 163.⁶⁰ At present, seventy-

others based upon measurable viewing habits. The markets, called areas of dominant influence (ADI's) by Arbitron, include the geographical unit employed by the U.S. Department of Commerce (the standard metropolitan statistical area (SMSA)) as well as the area of license as determined by the Commission. THE ARBITRON CO., INSIDE THE NEW TELEVISION MARKETING REPORT, ARBITRON TELEVISION (1980); Arbitron Ratings, Television: Audience Estimates, May 1982. See generally S. EASTMAN, *supra* note 35, at chs. II, VII.

50. BROADCAST RATING COUNCIL, INC., UNDERSTANDING BROADCAST RATINGS 5 (1978).

51. Broadcast Station Totals for Aug. 1982, *supra* note 49.

52. Subscription TV Service, *supra* note 5, at 343.

53. S. EASTMAN, *supra* note 35, at 107.

54. *Id.* at 108.

55. *Id.* at 109.

56. National Cable Television Association, Cable Television Developments, Aug. 1982.

57. *Id.*

58. *Id.*

59. See *supra* note 1.

60. *Id.*

three MDS operators account for approximately 1% of television households.⁶¹ Satellite master antenna television systems (SMATV) number approximately 100 and serve apartments and condominiums. SMATV has approximately 500,000 subscribers.⁶²

2. *The Potential Outlets*

A number of possible new outlets are on the horizon. Direct Broadcast Satellites (DBS) could provide from thirty to sixty new channels per market.⁶³ Nine licensees are authorized to provide DBS service, scheduled to begin in 1986.⁶⁴ Low Power Television (LPTV) applications number 6,500.⁶⁵ Such stations have broadcast ranges of from ten to fifteen miles.⁶⁶ The number of potential outlets varies in the 213 markets.

Aside from DBS and LPTV, there will be more cabled homes as existing cable systems expand and new ones come on line.⁶⁷ The number of MDS outlets may mushroom if the FCC expands spectrum space available to MDS, thereby increasing the number of MDS channels to eight per market.⁶⁸ Finally, the Commission could also authorize the creation of short spaced VHF drop-ins, thereby increasing the number of VHF television stations by at least 162.⁶⁹

The number of competitive video program outlets is increasing and further increases are likely in the future. The inevitable result of such a large influx of outlets, should they actually enter the marketplace under separate ownership, would be heightened competition,⁷⁰ market segmentation and greater program diversity.

B. The Importance of the Current Video Outlet Explosion to Minorities

The current video technology explosion is of great importance to minorities. It could result in new video distribution outlets, forcing greater competition and market segmentation. Greater video outlet competition and

61. HOUSE REPORT, *supra* note 1, at 25.

62. Hammond & Guernica, *supra* note 8, at 10, B-17.

63. See *supra* note 3.

64. *Channels Field Guide*, *supra* note 1, at 30.

65. *Id.* at 62.

66. *Id.*

67. *Id.* at 4, 8; Rothbart, *Franchising: Major Urban Centers Stall on Cabling, But Medium-Sized Cities Make Strides*, CABLEVISION, Dec. 27, 1982, at 35. There are 2,500 franchises approved but with no systems built. Broadcasting/Cablecasting Yearbook 1983, at D3.

68. See *supra* note 1.

69. NEW TECHNOLOGIES, *supra* note 1, at 14.

70. HOUSE REPORT, *supra* note 1; NEW TECHNOLOGIES, *supra* note 1.

audience segmentation within current national and local markets could lead to the establishment of new minority-oriented video outlets, much the same as competition from television and increased radio outlets forced the segmentation of radio and the development of minority-oriented radio formats (as opposed to minority-owned stations) in the 1950's.⁷¹ The development of sophisticated video audience segmentation would, in turn, create opportunities to aggregate and serve minority audiences. Once aggregated, the minority audience could stimulate the production of more minority-responsive programming via concentrated consumer demand.

After a distribution and programming base is developed, minority-owned production companies could begin to compete in the national markets. This result would closely parallel the rise of firms such as Motown in the 1960's.⁷² When minority-owned programming firms begin to compete nationally, cultural diversity becomes achievable.

Critics may argue that minority ownership of production and distribution firms will not guarantee the development and dissemination of minority-responsive programming for two reasons. First, general market demand and economics will force minority entrepreneurs to produce and program in a manner responsive to homogeneous tastes.⁷³ Second, minority-responsive programming may, as in the past, be provided by "culturally neutral" majority entrepreneurs.⁷⁴ Thus, the fact that the entrepreneur is a minority class adds nothing.

The history of minority involvement in the audio industry, however, belies these criticisms. First, the influx of competitive audio and video outlets in the 1950's and 1960's created the economic incentive for radio broadcasters to serve smaller, more discrete audiences.⁷⁵ Second, from the 1950's through to the present, most minority-oriented radio stations have been majority, rather than minority, owned.⁷⁶ Minority communities have criticized these stations for three decades, primarily for lack of responsive programming.⁷⁷ Minorities have also consistently criticized television as

71. J. ROSSE, FEDERAL TRADE COMMISSION PROCEEDINGS OF THE SYMPOSIUM ON MEDIA CONCENTRATION, Vol. 1, 1978, at 144; *Bachman, The Dynamics of Black Radio*, WASH. CREATIVE UNIVERSAL PRODUCTS 13 (1977); Garnett, *How Soulful is "Soul Radio?"*, Race Relations Information Center: Nashville, Tenn., Mar. 1970.

72. Garnett, *supra* note 71, at 16-18.

73. See *infra* notes 138-69 and accompanying text.

74. Garnett, *supra* note 71, at 5-6.

75. See *supra* text accompanying note 71.

76. Garnett, *supra* note 71. Indeed, during the mid-seventies there was confusion as to whether many black-oriented stations were black-owned.

77. *Id.* at 15, 18, 25-31, 35-41. See also Hammond, *supra* note 34, at 453.

being unresponsive.⁷⁸ Indeed, recent developments appear to justify such criticism.⁷⁹

It is therefore not surprising that the Commission should find that the broadcast industry lacks diversity.⁸⁰ Nor is it surprising that the FCC found minority ownership to be a crucial component in its attempts to ensure the legitimate presentation of minority viewpoints.⁸¹ Petitions to deny renewal of station licenses brought by minorities against minority-owned broadcast outlets are few,⁸² creating the clear inference that minority-owned stations are responsive to their communities.

III. MINORITY OWNERSHIP AND AN UNREGULATED VIDEO MARKETPLACE

The FCC recently acknowledged the continuing need for a federal minority ownership policy.⁸³ It issued policy statements expanding the applicability of the policy to cable⁸⁴ and enhancing the ability of the tax certificate⁸⁵ component to attract investment in minority-owned media.⁸⁶ Many Commissioners have publicly announced their support for the pol-

78. See *supra* notes 16-18 and accompanying text.

79. See *supra* text accompanying note 24. Those who argue that ownership is irrelevant to content have clearly failed to assess adequately the extent to which the majority-owned media *still* reflect opinions, beliefs and viewpoints that are white and male-oriented. The overwhelming predominance of such viewpoints presented by an industry owned predominantly by white males is not coincidence. Apparently, the courts, the Commission and the Executive Branch have recognized this and have tried to offset it by fashioning a minority ownership policy.

80. See Statement of Policy on Minority Ownership, *supra* note 22 at 981-82.

81. *Id.*

82. Hammond, *supra* note 34, at 454.

83. *Policy Statement and Notice of Proposed Rulemaking In The Matter of Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting*, F.C.C. 82-523, released Dec. 13, 1982, at 1-6.

84. *Policy Statement on Minority Ownership of Cable Television Facilities*, F.C.C. 82-524, released December 22, 1982.

85. The tax certificate component is authorized under § 1071 of the Internal Revenue Code, 26 U.S.C. § 1071 (1976), which authorizes the Commission inter alia to issue tax certificates to majority broadcast station owners who sell their properties to minority-owned firms or entrepreneurs. The certificate enables the sellers to defer the payment of federal taxes on the capital gains resulting from sale of the properties. The Commission's grant of a tax certificate is contingent upon its determination that the sale or exchange of property is necessary or appropriate to facilitate the adoption of, or change in a policy relating to ownership and control of broadcast properties. *Policy Statement, supra* note 83, at 10.

86. The Commission will now make tax certificates available to investors, regardless of identity, who divest themselves of shares initially purchased prior to, or within one year of, the issuance of a broadcast license. The investors must show that their capitalization either enabled the minority controlled firm to acquire the broadcast property or was the source of necessary start-up capital. *Policy Statement, supra* note 83, at 12.

icy as well.⁸⁷ It would appear, then, that the policy is assured of having a continuing fruitful existence. Recent proposals by members of the Commission would, however, remove various cross and multiple ownership restrictions⁸⁸ and tie the award of the minority ownership comparative preference more closely to service to significant minority populations.⁸⁹ These proposals, if enacted, would seriously jeopardize the current thrust of the policy. While inconsistencies between minority ownership policies and the Commission's efforts not to regulate may not be readily apparent, a closer examination of the mechanics of the ownership policy, its regulatory justification and its place within the context of prior Commission efforts to maximize diversity, provide clarity.

87. See Mark S. Fowler, Chairman, FCC, Statement on Recommendations of Advisory Committee on Minority Ownership, Dec. 2, 1982; Statement of Commissioner Henry M. Rivera, Re: Legislative Proposals, Dec. 2, 1982; Legislative Recommendations of the Advisory Committee on Alternative Financing for Minority Opportunities in Telecommunications, F.C.C. Rep. No. 5112, Dec. 2, 1982.

88. See *supra* note 11.

89. Other recent Commission action raises the spectre that minorities may not receive unrestricted market access. While the tax certificate component applies to broadcasting and has been extended to cable, it has not been applied to MDS and other common carrier video distribution systems. At least one Commissioner believes that the extension of the tax certificate to the financing and/or sale of nonbroadcast firms, such as MDS, would be inappropriate. Because MDS is a common carrier, the nexus between ownership and editorial control is not, allegedly, extant. Hence the underlying justification of the minority ownership policy is absent. *FCC Acts to Increase Minority Participation in Telecommunications Field*; Concurring Statement of Commissioner Mimi Weyforth Dawson Regarding: Legislative Recommendations of the Advisory Committee on Alternative Financing for Minority Opportunities in Telecommunications, F.C.C. Rep. No. 5112, Dec. 2, 1982.

Of far greater significance to the continued success of the federal government's minority ownership initiatives are the limitations proposed in the dissenting opinions of Commissioners Fowler and Sharp in *Waters Broadcasting Corp.*, F.C.C. Rep. No. 17,273, at 26,995 & 27,117 (Nov., 29 1982); Commission majority in, *In re* Application for Assignment of License of UHF Television Station WJAN, Canton, Ohio, from PTL of Heritage Village Church and Missionary Fellowship, Inc. (PTL) to David Livingston Missionary Foundation, Inc., F.C.C. Rep. No. 18,597, released Dec. 8, 1982 [hereinafter cited as *PTL*]. In the former, the two dissenting Commissioners argued that minority ownership of a potential licensee was less compelling than the local participation of the competing applicant. Thus, they concluded that minority ownership is desirable only where it is likely to serve the needs of a majority population. See *Waters Broadcasting Corp.*, *supra* at 26,995-27,005, 27,017-18. In *PTL*, the Commission declined to designate for hearing on disqualifying issues, a licensee that allegedly defrauded its viewing public and lied to the Commission. See *Motion for Stay and Petition for Reconsideration* filed in *PTL* by the National Black Media Coalition, The National Association of Black Owned Broadcasters, the Stark County Branch of the NAACP and the Akron Branch of the NAACP, Jan. 7, 1983. Instead, the licensee was allowed to assign its license to a third party thereby circumventing the hearing and the possible opportunity for a minority to purchase the station under the distress sale component. The decision further undermined the utility of an initiative already seriously weakened by the Commission's deregulation of radio. There have been no distress sales of radio stations since the deregulation of radio took effect.

A. The Policy

The minority ownership policy is designed to increase diversity of program selection and ownership control within the video industry in a structural, content-neutral manner.⁹⁰ As such, it seeks to facilitate the same laudable first amendment goals as those furthered by the Commission's limits on media concentration in markets,⁹¹ group ownership generally,⁹² regional concentration⁹³ and cross ownership of competitive media.⁹⁴ Rather than restrict the number and types of video facilities an individual or entity may own, the minority ownership policy facilitates minority entry by providing financial, procedural and regulatory policy incentives to encourage inclusion of minorities as owners of video properties.

The policy employs tax certificate and distress sale components to provide financial incentives for majority owners of broadcast and cable properties to sell to minorities.⁹⁵ The tax certificate component allows majority owners of all or a part of broadcast or cable properties to defer the payment of capital gains tax on profits when the facility is sold to a minority-controlled company⁹⁶ and the proceeds are reinvested in similar media facilities within three years.⁹⁷ The distress sale component allows a majority entrepreneur who faces the loss of his/her station license because of potential disqualifying issues to avoid the possible loss of financial interest in the outlet by selling to a minority-controlled purchaser at no more than

90. *Policy Statement*, *supra* note 83, at 1; *Statement of Policy on Minority Ownership*, *supra* note 22, at 981.

91. 47 C.F.R. §§ 3.35(a), 73.240(a)(1), 73.636(a)(1) (1979). The "one to a market rule" prohibits the ownership or control of both a radio station (AM or FM) and a television station within a market where the coverage area of one station is completely encompassed by that of the other.

While the Commission did not adopt the rule retrospectively, 47 C.F.R. §§ 3.35 n.3 (1977), "grandfathered" combinations do not survive the attempted assignment or transfer to a new common owner. 47 C.F.R. § 73.240(a)(1) n.8 (1979).

92. For a discussion of the rule of sevens, see *supra* note 11.

93. Ownership of three stations is prohibited where it would result in any two of the stations being within one hundred miles of the third, and where an overlap of primary service areas exists. 47 C.F.R. § 73.636(a)(2) (1979).

94. The FCC prohibits cross-ownership of a cable system and a television station where the broadcast station's grade B contour overlaps any part of the cable system's coverage area and there is a "cognizable interest" in each facility. 47 C.F.R. § 76.501(a) (1977). See *supra* note 11, for a discussion of the term "cognizable interest" and the Commission's recent proposal to change the ownership attribution rules. The Commission also prohibits the common ownership of a broadcast station and a daily newspaper where the station's contour encompasses the entire community to which the newspaper publishes. 47 C.F.R. §§ 73.35(c), 73.240(c), 73.636(c) (1979).

95. *Statement of Policy on Minority Ownership*, *supra* note 22.

96. See *Policy Statement*, *supra* note 83, at 8-12.

97. *Id.*

75% of the actual value of the property.⁹⁸ This policy depends on vigorous enforcement of Commission rules. There is significant evidence that enforcement is lessening.⁹⁹

As another major component of the policy, the FCC will award merit in comparative hearings to entities having significant active management participation by minority owners.¹⁰⁰ The Commission also expedites consideration of minority broadcast license applications.¹⁰¹ Aside from the Commission's policy, federal loan programs and venture capital are available to minority broadcast entrepreneurs as a result of ownership initiatives begun by the Carter Administration and continued by the Reagan Administration.¹⁰² This combined federal effort has been moderately successful. Between 1978 and 1983, the percentage of minority owned broadcast facilities increased from 1% to 2% of existing operating facilities.¹⁰³

B. Regulatory and Policy Justifications for Minority Ownership of Telecommunications Facilities

The courts, the Executive Branch, the Commission and Congress have found that the structurally oriented minority ownership policy benefits the public by increasing the diversity of media control¹⁰⁴ and program selec-

98. Statement of Policy on Minority Ownership, *supra* note 22, at 783.

99. See *supra* note 89.

100. Statement of Policy on Minority Ownership, *supra* note 22, at 982.

101. *Id.*

102. Hammond & Guernica, *supra* note 8, at 31-47; National Association of Broadcasters, *Buying or Building a Broadcast Station*, Oct. 1982, at 13-15; Minority Telecommunications Development Program, Fact Sheet Update, Fall 1980.

103. Hammond & Guernica, *supra* note 8, at 1.

104. Bunkfeldt Broadcasting Corp. v. FCC, No. 82-1212 (D.C. Cir. filed Jan. 6, 1983); Garrett v. FCC, 513 F.2d 1056, 1063 n.52 (D.C. Cir. 1975); TV-9, Inc. v. FCC, 495 F.2d 929, 937 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974); Citizens Communications Center v. FCC, 447 F.2d 1201, 1213 n.36 (D.C. Cir. 1971); *Policy Statement*, *supra* note 83, at 1; Statement of Policy on Minority Ownership, *supra* note 22, at 980-81; Exec. Order No. 12,046, 43 Fed. Reg. 13,359 (1978) (establishment of the Minority Telecommunications Program); Petition for Issuance of Policy Statement or for Notice of Inquiry In the Matter of Establishment of Policy to Promote Broadcast Ownership by Minorities, and Related Implementing Policies, RM-3055; Doc. No. 78-355, Jan. 1978; H.R. 1155, 98th Cong., 1st Sess. (1983). (Minority Telecommunications Development Act of 1983); H.R. 13,015, 95th Cong., 2d Sess. (1978); H.R. 10,132, 95th Cong., 1st Sess. (1977).

H.R. 1155 among other things seeks to codify the Commission's Tax Certificate and Distress Sales Components as they apply to minority ownership of broadcasting. It would extend the applicability of the components to cable. H.R. 1155, 98th Cong., 1st Sess. § 4 (1978). It would also allow the Commission to waive its multiple ownership attribution percentages for small business investment corporations chartered under § 301(d) of the Small Business Investment Act of 1958. 15 U.S.C. § 301(d) (1958); H.R. 1155, 98th Cong., 1st Sess. § 4 (1978).

tion¹⁰⁵ in a nondiscriminatory manner while avoiding direct governmental intrusion into the programming decisions of media outlets.¹⁰⁶ The policy seeks to alleviate the chronic underrepresentation of minority viewpoints by increasing the number of minority owners in broadcasting who, through the exercise of editorial control, may then diversify the selection of programming available to the public.¹⁰⁷ More diverse programming increases opportunities for a variety of viewpoints to be expressed. This result is obtained without government interference with the licensees' editorial control, thereby satisfying the first amendment goal of increased diversity without government infringement on broadcast speech.¹⁰⁸ Moreover, implementation of the program is constitutionally sound.¹⁰⁹ The policy incorporates preexisting Commission policies that allow race and ethnic origin to become one of many competing comparative criteria considered in furthering service to the public.¹¹⁰ Finally, minority ownership promotes minority economic growth and employment opportunities,¹¹¹ thereby creating economic diversity as well.¹¹²

The United States Court of Appeals for the District of Columbia Circuit, as early as 1971, noted the relationship between diversity of ownership and the public interest. The court stated:

Since one very significant aspect of the 'public interest, convenience, and necessity' is the need for diverse and antagonistic sources of information, the Commission simply cannot make a valid public interest determination without considering the extent to which the ownership of the media will be concentrated or diversified by the grant of one or another of the applications before it.¹¹³

Later, in *TV-9, Inc. v. FCC*, the Court clearly established the nexus between diversity and minority ownership when it held that the FCC, in a comparative license hearing, must afford favorable consideration to applicants who provide "local minority group[s] media entrepreneurship."¹¹⁴

105. See *supra* note 104 for cases, policy statements and petition filed in Commission Doc. No. 78-355.

106. *Bunkfeldt*, No. 82-1212 (D.C. Cir. filed Jan. 6, 1983). See also *supra* note 22, Brief of the Respondent (FCC) in *Bunkfeldt* (citing *University of Calif. Regents v. Bakke*, 438 U.S. 265, 316-18 (1978)).

107. See *supra* note 104.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Hammond & Guernica, supra* note 8, at 1-2.

112. *Id.*

113. *Citizens Communications Center*, 447 F.2d at 1213 n.36.

114. *TV-9, Inc.*, 495 F.2d at 937.

Finally, in *Garrett v. FCC*,¹¹⁵ the court affirmed its holding in *TV-9*, reiterating that: "[t]he entire thrust of *TV-9* is that [minority] ownership and participation together are themselves likely to bring about programming that is responsive to the needs of the [minority] citizenry"¹¹⁶

While the court was making pronouncements regarding minority representation in broadcasting, the Commission was examining ways to increase minority involvement. In 1976, the Commission, in response to the court, its own precedent and an awareness of the Kerner Commission finding that television's misrepresentation of minorities was a contributor to the volatile racial climate of the sixties, (1) awarded enhanced credit in comparative proceedings where minority owners would participate in management,¹¹⁷ and (2) expedited the processing of license applications containing significant minority ownership.¹¹⁸

Despite the judicial and regulatory actions of the early and mid seventies, minority ownership of broadcast stations did not significantly increase. Thus, in 1977 the Commission held a conference on minority ownership, seeking to determine the extent of minority underrepresentation and ways to remedy it. As was later to become a recurring theme, the conference highlighted the necessity of promoting greater diversity of opinion in the media through policies favoring minority ownership.¹¹⁹

The conference bore substantial fruit less than a year later when, in January 1978, the Carter Administration established its Minority Telecommunications Development Program (MTDP).¹²⁰ The MTDP was a multiagency initiative to aggressively further minority ownership via regulatory policies¹²¹ and federal and private financial assistance.¹²² The administration, in petitioning the Commission, stated that: "[i]n light of the miniscule minority ownership in the broadcast industry compared with the substantial minority population in many areas, a strong case exists to promote increased minority ownership"¹²³

The Commission responded to its conference and the Carter Administration's filing by later publishing a *Report on Minority Ownership in*

115. 513 F.2d 1056 (1975).

116. *Id.* at 1063.

117. *Berryville Broadcasting Co.*, 70 F.C.C.2d 1 (1978); *Rosemor Broadcasting Co., Inc.*, 54 F.C.C.2d 394 (1975).

118. *Atlas Com. Inc. (WJPC)*, 61 F.C.C.2d 995 (1976).

119. MINORITY OWNERSHIP TASK FORCE, FEDERAL COMMUNICATIONS COMM'N REPORT ON MINORITY OWNERSHIP IN BROADCASTING 4 (1978).

120. Executive Order No. 12,046, *supra* note 104.

121. *Id.*

122. *Id.*

123. Petition filed in Commission Doc. No. 78-355, *supra* note 104, at 34.

Broadcasting,¹²⁴ and promulgating a *Statement of Policy on Minority Ownership of Broadcasting Facilities*¹²⁵ in May of 1978. Both documents emphasized the value of the Commission's minority ownership policies in increasing diversity of control and programming.¹²⁶ Thus the Commission found:

[a]dequate representation of minority viewpoints in programming serves not only the needs and interests of the minority community but also enriches and educates the nonminority audience. It enhances the diversified programming which is a key objective not only of the Communications Act of 1934 but also of the First Amendment [T]he Commission believes that ownership of broadcast facilities by minorities is another significant way of fostering the inclusion of minority views in the area of programming.¹²⁷

The Executive Branch initiatives and Commission policies met with significant success. From 1978 to 1981 the number of minority-owned broadcast stations increased from 72 to 163.¹²⁸ Despite this increase, however, minorities were still substantially underrepresented, owning no more than 2% of all existing broadcast facilities and less than 1% of broadcast television stations.¹²⁹ As a result, the Commission, in realistically appraising the progress of the ownership program, recently acknowledged the "ever present 'dearth of minority ownership' in the telecommunications industry to be a serious concern."¹³⁰

To further increase minority ownership, the Commission created the Advisory Committee on Alternative Financing for Minority Opportunities in Telecommunications (the Committee) in September 1981.¹³¹ The Committee was established to identify and recommend ways in which the Commission might further facilitate minority ownership.¹³² It recommended many items,¹³³ some of which were recently adopted by the Commission

124. REPORT ON MINORITY OWNERSHIP IN BROADCASTING, *supra* note 119.

125. Statement of Policy on Minority Ownership, *supra* note 22.

126. *Id.* at 981; REPORT ON MINORITY OWNERSHIP IN BROADCASTING, *supra* note 119, at 4.

127. Statement of Policy on Minority Ownership, *supra* note 22, at 980-81.

128. Nat'l Ass'n of Broadcasters, Dep't of Minority and Special Services, BROADCASTING FACTS, 1979, 1981, 1982; *Carter Plan to Get Minorities Into Ownership of Broadcast Cable*, BROADCASTING, Feb. 6, 1978, at 47; *Minorities in Broadcasting: The Exception is No Longer the Rule*, BROADCASTING, Oct. 15, 1979, at 27.

129. Hammond & Guernica, *supra* note 8, at 19.

130. *Policy Statement*, *supra* note 83, at 4.

131. *Id.* at 4 n.15.

132. *Id.*

133. See *supra* notes 95-98 and accompanying text.

in two policy statements.¹³⁴ The Commission also presented legislative proposals to Congress¹³⁵ and set another significant item for rulemaking.¹³⁶

IV. NON-REGULATION: MARKETPLACE THEORIES AND MARKETPLACE REALITIES

We believe that the goals of our national communications policy are best served when we allow the marketplace to function as much as possible. Government meddling, however well meant, ought to be avoided. Consumer choice and entrepreneurial initiative should be emphasized over pervasive government direction.¹³⁷

A. Non-regulation of Ownership

Recent Commission proposals would lead to significant policy reversals of its multiple and cross ownership rules. These plans emanate from several Commissioners' beliefs that the current restrictions may be arbitrary, inefficient and anticompetitive. And, to the extent that they rely on a public policy assumption that there is a scarcity of video outlets, the rules are felt to be increasingly illogical. Multiple and cross-ownership rules are felt

134. *Id.*

135. ADVISORY COMM. REP., *supra* note 14. Among the proposals made by the Advisory Committee were: 1) the extension of the tax certificate (§ 1071(a) of the Internal Revenue Code) to the sale and/or financing of purchases of nonbroadcast entities such as cable and common carrier firms, *id.* at 9; and 2) the amendment of § 48(c) of the Internal Revenue Code to increase the limit on depreciable property that can be considered in establishing the investment tax credit, *id.* at 1. On January 17, 1983, the two legislative proposals were transmitted to the Senate and the House. Letter from Mark S. Fowler, Chairman, Federal Communications Commission, to the Vice President of the United States, United States Senate (January 17, 1983); Letter from Mark S. Fowler, Chairman, Federal Communications Commission, to the Speaker of the House of Representatives (January 17, 1983). Both letters were accompanied by copies of the "Commission's" proposed legislation regarding 26 U.S.C. §§ 48(c), 1071(a).

136. The Advisory Committee Report also proposed that the Commission explore expansion of the rights of seller-creditors to include a reversionary interest in the event of a default on payment of the seller-financed loan by the minority purchaser. At present, the seller may take a security interest in the physical assets of the station or the stock of the corporate licensee. The creation of a reversionary interest would, it was argued, create greater seller incentive to finance the sale of the property. ADVISORY COMM. REP., *supra* note 14, at 33-34. In response, the Commission has issued a Notice of Proposed Rulemaking Regarding Seller-Creditors' Rights. See *Policy Statement*, *supra* note 83, at 14-16.

137. Statement of Mark S. Fowler, Chairman, Federal Communications Commission, Before the Subcommittee on Telecommunications, Consumer Protection and Finance, of the House Committee on Energy and Commerce Oversight Hearing on the Broadcast—Mass Media Activities of the Federal Communications Commission 5, Dec. 1, 1982.

to be arbitrary because the proscribed levels of concentration are not based upon a finding of identifiable harm (i.e., a substantial diminution of diversity and/or quality of service).¹³⁸ They are arguably inefficient because they do not assess relevant geographic market shares in determining whether sufficient diversity exists.¹³⁹ Finally, they are anticompetitive because they may thwart attempts by broadcasters to develop competitive economies of scale at the local and national market level through merger and/or acquisition.¹⁴⁰ Commission policies enhancing diversity of ownership allegedly fail to acknowledge that maximum diversification of viewpoints is a function of structural competition rather than diversity of ownership *per se*.¹⁴¹

Critics of the rules also posit that to the extent Commission ownership restrictions rely on prior findings of spectrum scarcity, the rules are illogical.¹⁴² The number and availability of video distribution outlets is, allegedly, no longer dependent upon spectrum limitations.¹⁴³ Refinements in spectrum management, Commission policies favoring the entry of new technology and the availability of actual and potential competitive substitute video outlets are assumed to have eliminated scarcity as a concern in all but the smallest markets.¹⁴⁴ Further, to the extent that scarcity may still exist, it is arguably a function of the market's ability to support competing outlets and the Commission's television allocation policies.¹⁴⁵ Such critics conclude that the Commission should eliminate current numerical and locational limitations on ownership of like or substitute distribution outlets.¹⁴⁶ Instead, the Commission should either eschew regulation and rely on the antitrust laws¹⁴⁷ or develop an index of industry concentration with which to determine when sufficient concentration exists to undermine diversity and therefore require regulation.¹⁴⁸

138. *Wirth's View on the State of the Industry*, *supra* note 11; Fowler & Brenner, *supra* note 11, at 246; NETWORK INQUIRY, *supra* note 11, at 360-63.

139. NETWORK INQUIRY, *supra* note 11, at 360-63.

140. Wines, *The FCC and Its Critics Are at Odds on How to Control the Video Explosion*, THE NAT'L J. 1408, 1409 (1982) (citing comment of Commissioner Mimi Weyforth Dawson, Office of Plans and Policy); FCC Policy on Cable Ownership 109-25 (1981); NETWORK INQUIRY, *supra* note 11, at 363.

141. NETWORK INQUIRY, *supra* note 11, at 364.

142. Wines, *supra* note 140, at 1413. See also Fowler & Brenner, *supra* note 11, at 225.

143. Fowler & Brenner, *supra* note 11, at 222-25.

144. *Id.* at 223-26.

145. *Id.* at 224-26.

146. *Id.* at 234.

147. *An Index in the Act on Multiple Ownership*, BROADCASTING, Jul. 19, 1982, at 35, 36.

148. Dawson's Herfindahl Proposal, BROADCASTING, Aug. 2, 1982, at 44, 45.

B. The Limits of Non-regulation

[E]xperience . . . cautions us against giving too much power over the new media to established private interests Established firms argue that the efficiencies their experience and resources can bring to bear on the new technologies outweigh the dangers of concentration. . . . It is important to remember, however, that concentration poses special dangers in the communications area, whatever the economic import With many of the new technologies just getting off the ground, a diligent pursuit of structural strategies offers a real opportunity to avoid the mistakes of the past. Instead of allowing communications giants to grow to a size requiring content regulation, we could encourage a "thousand flowers to bloom" from the outset and limit government regulation to content-neutral ones.¹⁴⁹

The theoretical and practical undergirding of the Commission's deregulatory thrust regarding ownership restrictions has been criticized significantly. The proposals are criticized as failing to assess adequately the potential for economic harm should the rules be removed abruptly.¹⁵⁰ Absent restrictions, many large firms would have the incentive to grow to a size beyond which efficiencies of scale accrue in order to secure monopoly profits.¹⁵¹ While the FCC or the Justice Department might arguably be able to invoke the antitrust laws to prevent such growth, how will they know when the theoretically proscribed level of concentration has been reached?¹⁵² At best, concentration ratios provide an incomplete view of

149. Bazelon, *The First Amendment's Second Chance*, CHANNELS, Feb.-Mar. 1982, at 16-17.

150. Wines, *supra* note 140, at 1413; Barber, *The Second American Revolution*, CHANNELS, Feb.-Mar. 1982, at 21, 24-25, 62; Brown, *Fear of Fowler*, CHANNELS, Dec.-Jan. 1982, at 21-22.

151. NETWORK INQUIRY, *supra* note 11, at 344.

152. *Id.* at 358-59. While the Department of Justice may arguably be excused from engaging in the rigorous market analysis necessary to determine the "particular economic consequences of ownership patterns within the television industry," the Commission allegedly is not. Rather, because of its special expertise and its more limited and, hence, arguably more precise focus on television and its competitors, the Commission is "expected to bring adequate resources and unparalleled expertise to bear." *Id.* at 358. Indeed it is just such an inquiry that Commissioners Mimi Dawson and Henry Rivera have called for in several proceedings before the Commission. *An Index in the Act on Multiple Ownership*, *supra* note 147, at 35-36. Commissioner Dawson has aptly asked the compelling question, "What have we done to our diversity mandate? We've stretched it out of recognition. I think we're trying to answer the wrong question There are some concerns we have—diversity and competition—and we should focus on these." *Issue of Financial Interest and Syndication Rules*, COMMUNICATIONS DAILY, Mar. 16, 1983, at 5.

The Commissioner's question goes to the crux of the current theoretical debate generated by the Commission's proposed deregulatory thrust. Competition, at least as it is more tradi-

the impact of firm expansion on market competition.¹⁵³ The efficacy of their use has been questioned on numerous occasions.¹⁵⁴ Moreover, loss or gain in market efficiencies is difficult to measure in merger and acquisition cases. "Given the present state of economic knowledge, one cannot measure with certainty the minimum structural conditions . . . necessary to ensure competitive behavior."¹⁵⁵ Consequently, it cannot be known for certain when the minimum conditions for competition have been circumvented and, hence, when antitrust enforcement is appropriate or possible.¹⁵⁶ Conversely, it cannot be known if, and at what juncture, the current ownership rules may injure competition or reduce consumer welfare.

Notwithstanding the limitations of current market measurement, the marketplace theory of regulation in broadcasting and in videocasting generally is said to fail on other grounds. Consumer demand does not control the provision of broadcast programming, advertisers do.¹⁵⁷ "No matter how efficient broadcasting is as a supplier of viewers to advertisers, . . . the current program mix could be inefficient."¹⁵⁸ At best it is imperfect. Thus, there is no guarantee that the broadcast frequencies will be used efficiently if deregulated.¹⁵⁹

Ethical considerations of wealth distribution render economic theory's support for nonregulation of subscriber technologies less compelling.¹⁶⁰

tionally defined in economic theory and antitrust terms, is concerned with the promotion of consumer welfare and allocative efficiency. Bradley, *supra* note 12, at 691. The first amendment, however, seeks to maximize diversity of information sources. Notions of economic efficiency are subordinate to the realization of the largest number of diverse, mutually antagonistic sources of information. Indeed, in the past, the Commission has declined to state how much diversity of ownership was enough, finding instead that: "there is no optimum degree of diversification, and we do not feel competent to say or hold that any particular number of outlets of expression is enough." Multiple Ownership of Standard, FM & TV Broadcast Stations, 22 F.C.C.2d 306, 312 (1970), *on reconsideration*, 28 F.C.C.2d 662 (1971). Clearly, the public and the industry deserve a reasoned and substantially informed Commission decisionmaking process in order to justify any ultimate removal of the first amendment presumption regarding diversity, especially if the price of "efficiency" is less diversity.

153. Multiple Ownership, 22 F.C.C.2d at 351-52.

154. *Id.* at 355.

155. *Id.* at 358-59.

156. "[E]ven the most discriminating approach . . . will require that some subjective judgments be made and some inexact balances be struck." *Id.* at 359. At least one observer has suggested the development of a media-specific merger policy premised on equating antitrust and first amendment concerns. See Bradley, *supra* note 12, at 691.

157. Brennan, *Economic Efficiency and Broadcast Content Regulation*, 13-15 Economics Policy Office Discussion Paper, No. 83-1, Antitrust Div. U.S. Dep't of Justice (to be published in Fed. Com. L.J.).

158. *Id.* at 13.

159. *Id.* at 13-15.

160. *Id.* at 6, 25.

Ultimately, an efficient marketplace will do no more than reflect the inequitable distribution of wealth. This assumes that consumer preferences are stable and articulate.¹⁶¹ There is, however, some question whether video programming merely reflects or creates and/or changes consumer preferences. To the extent that video programming has the potential to change viewer preferences, there may be no standard against which to measure the ability of videocasters to satisfy consumer demand.¹⁶²

Aside from the theoretical infirmities of marketplace theory, practical considerations also limit its applicability. Many critics insist that there is still a scarcity of video outlets. They point out that cable and other new pay services have not yet penetrated the majority of the video market.¹⁶³ Previous allegedly probroadcast Commission policies are said to have limited cable and STV development in the past. Current financial conditions and city franchising demands may continue to limit cable penetration and will certainly slow it down.¹⁶⁴

Consequently, existing media conglomerates continue to dominate the video marketplace. Commission movement to expand spectrum usage by introducing VHF drop-ins and expanding MDS service has been labelled dilatory,¹⁶⁵ while the sluggish introduction of low power television may render it moot by the time low power enters the market.¹⁶⁶ Meanwhile, merger and acquisition activity continues at almost record rates in broadcasting and cable.¹⁶⁷ At best, the net effect of the current regulatory and market developments is a slow, minimal erosion of the dominant market position of broadcasting industry giants, not the plethora of competitive outlets some allege already exists.

At worst, the competitive threat to the established technologies may arguably be diminishing at a time when prudence and economic theory¹⁶⁸

161. *Id.* at 16-19, 24-25.

162. *Id.*

163. Wines, *supra* note 140, at 1408, 1413; Barber, *supra* note 150, at 23-24; HOUSE REPORT, *supra* note 1, at 27.

164. *Channels Field Guide*, *supra* note 1, at 34; Technology and Economics Inc., *The Urban Franchising Context from The Emergence of Pay Cable Television* (Cambridge, Mass.), Aug. 1980; *The Gold Rush of 1980*, BROADCASTING, Mar. 31, 1980, at 35.

165. *Fowler's Report Cards*, BROADCASTING, Jan. 24, 1982, at 78; Auerbach, *Conservative Study Faults Reagan Deregulation Effort*, Wash. Post, Jan. 16, 1983, at F1, col. 4; Wines, *supra* note 140, at 1409.

166. *Fowler's Report Cards*, *supra* note 165, at 78; *Channels Field Guide*, *supra* note 1, at 62.

167. *See supra* note 12.

168. Studies of the relationship between monopoly, concentration and innovation support the assertion that under market conditions where rich technological opportunities exist, industry concentration should be minimized. F. SCHERER, *INDUSTRIAL MARKET STRUCTURE OF ECONOMIC PERFORMANCE* 377-78 (1980). It is well established that the current

indicate it should expand. This situation has led some critics in Congress to conclude:

[w]e are beginning to see disturbing indications that the present Commission believes a fully competitive market has already arrived and that it has no affirmative pro-competitive responsibility. Ignoring the data, the Commission asserts that because of the potential competition that is today provided by a host of new outlets, it must immediately achieve 'non-regulation' To argue for allowing 'marketplace forces' to govern, instead of regulation, while taking actions that limit competition, both dis-serves the industry and undermines the public interest.¹⁶⁹

V. CONCLUSION: NON-REGULATION AND MINORITY OWNERSHIP

[T]here are only 134 Black owned television and radio stations: 134 out of 9000 licensees, that is only one and a half percent of all the broadcast stations in the United States. . . . Certainly this represents progress, but it is not yet the diversity in ownership that we need and that the public interest requires. Where are the Black owned common carriers? . . . Where are the Black-owned cable systems in any kind of significant numbers?¹⁷⁰

Recent Commission activity seeking to increase minority ownership of the established technologies has been lauded on several occasions. The expanded and new initiatives are needed to render many minority entrepreneurs more financially competitive. They will undoubtedly be used. The Commission, however, declined to extend the ownership policy to the newer services such as MDS.¹⁷¹ The FCC has also sought to decrease or eliminate its current multiple and cross ownership rules as well as other regulatory mechanisms for achieving structural diversity.¹⁷² The contradictory nature of the Commission's actions has caused growing concern that "the deregulation package has a minority ownership ribbon wrapped

video marketplace is rich in technological opportunities. *See supra* notes 1-6. Under such market conditions, greater emphasis should be placed on competition in the form of new entrants and the continuous threat of new entrants. "Very high concentration . . . is apt to retard progress by restricting the number of independent sources of initiative and by dampening firms' incentive to gain market position through accelerated research and development." F. SCHERER, *supra* note 168, at 377-78.

169. HOUSE REPORT, *supra* note 1, at 27.

170. Remarks by Commissioner Joseph R. Fogarty, Federal Communications Commission, before the National Black Media Coalition, at 2, Wash. D.C., Sept. 30, 1982.

171. *See supra* note 89 (concurring statement of Commissioner Mimi Weyforth Dawson).

172. *See supra* note 11 and accompanying text.

around an empty box."¹⁷³

Efforts to stimulate meaningful minority media ownership require unrestricted availability of affordable competitive outlets for purchase. Commission restrictions on the numerical concentration of media ownership have contributed significantly to ensuring such availability. Without such restrictions, the utility of the financial initiatives is substantially diminished. The economic cost of entry can be bid up by larger firms capable of paying inflated rates for preferred properties.¹⁷⁴ Minority attempts to acquire cable systems and franchises,¹⁷⁵ as well as current merger and acquisition trends among large communications conglomerates support such observations.¹⁷⁶ Moreover, the proposed policy shift threatens the continued viability of the underlying justification for the minority ownership effort. Commission diversification policies that rely on marketplace competition diminish the importance of minority ownership policies based upon diversity of ownership.

If structural competition is most likely to facilitate maximum diversity of viewpoints, minority ownership becomes superfluous because the mar-

173. "There is a general feeling that FCC policies give mere lip service to minority ownership The concern voiced here is that Blacks believe that the deregulation package has a minority ownership ribbon wrapped around an empty box." Letter to the Honorable Timothy E. Wirth, Chairman, Subcommittee for Telecommunications, Consumer Protection and Finance, from the Honorable Parren J. Mitchell, Chairman, Subcommittee on SBA and SBIC Authority, Minority Enterprise and General Small Business Problems (December 1, 1982), at 2.

174. Despite increases over time in the number of broadcast and cable facilities, the cost of acquiring a broadcast station, cable system or cable franchise is growing steadily. *Changing Hands* 1982, *supra* note 12; *Mixed Reviews on 1982 from Brokers*, BROADCASTING, Jan. 10, 1982, at 66-67; Henderson, *Minorities and Small System Operators: Falling Further Behind?*, TVC, Dec. 1, 1981, at 116-17, 127.

175. The transition of the cable industry from small rural and suburban areas to the major market urban areas is placing small and minority-owned cable television companies at a decided disadvantage. Faced with the necessity of bidding on large urban systems that are not being franchised as multiple systems, small and minority firms typically lack the equity investment, technical resources and franchising expertise to compete against the larger multiple system owners (MSO's). Cable Television Industry, *Hearings Before the Subcommittee on SBA and SBIC Authority, Minority Enterprise and General Small Business Problems, of the Committee on Small Business, House of Representatives*, 97th Cong., 1st Sess. (1981). See also *Brother, Can You Spare \$10 Million?*, BROADCASTING, May 10, 1982, at 82; Henderson, *supra* note 174, at 116; *Examining the Barriers to Minorities in Cable Franchises*, BROADCASTING, Oct. 19, 1981, at 49-50; *House Hearings Examine How Small Business Can Get Into the Big Business of Cable*, BROADCASTING, Sept. 28, 1981, at 39; *Reviewing the Prospects for Minorities*, BROADCASTING, July 27, 1981, at 109.

176. Moozakis & Baird, *The Urge to Merge: Cable's Consolidation*, TVC, Oct. 1, 1981, at 86-89. See generally *Media Concentration*, *supra* note 12. See especially testimony of Ellen Berland Sachar, *id.* part II, at 156; testimony of James Dertouzos, *id.* part II, at 3, 7; testimony of John Lyons, *id.* part I, at 413.

ket will provide for minority viewers consistent with the relative priority of their articulated demands. If market share rather than the number and location of outlets is the operative criteria upon which levels of concentration and diversity are assessed, the number of facilities owned by many firms will be likely to grow beyond current limits. Concomitantly, as previously stated, the cost of entry will be likely to rise higher than current levels as the cost of highly valued properties and the percentage of the market necessary to ensure the ability to compete increase.¹⁷⁷ Consequently, deregulatory policies undermine the theoretical basis for minority ownership while substantially diminishing the practical ability to facilitate such ownership.

The impact of the Commission's deregulatory efforts on minority ownership of and service from the video distribution industry is likely to be significant and largely negative. Such efforts will impair the economic self-sufficiency of minority owners and program diversity.¹⁷⁸ This result would be tragic, not only because it would be manifestly unresponsive to the nationally recognized need for substantially increased minority sociocultural and economic representation in the media, but also because it is based on the premature implementation of a suspect regulatory philosophy which is, at best, ill conceived and, at worst, wrong. The Commission must seriously reexamine and reevaluate its current deregulatory thrust. Though its intent is admirable, the new policy direction threatens to "throw the baby out with the bathwater." Such a result would hardly be in the *public's* interest.

177. See *supra* note 174.

178. See Hammond & Guernica, *supra* note 8, at 1.

